

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

CIVIL ACTION NO. 01-11610-GAO

MICHAEL P. MADDEN,
Plaintiff

v.

JO ANNE B. BARNHART,
Commissioner of the Social Security Administration,
Defendant

MEMORANDUM AND ORDER

September 17, 2002

O'TOOLE, D.J.

The plaintiff, Michael P. Madden, seeks to reverse the decision by the Commissioner of the Social Security Administration (“Commissioner”) denying Madden’s application for disability benefits, or alternatively, to remand the matter for consideration of additional evidence. For the reasons stated below, the Plaintiff’s Motion to Reverse or Remand the Decision of the Commissioner (Doc. No. 12) is DENIED, and the Defendant’s Motion for an Order Affirming the Decision of the Commissioner (Doc. No. 15) is GRANTED.

I. Facts Appearing in the Record

Madden filed his application for Supplemental Security Income (“SSI”) benefits on November 3, 1997. R. at 13. His application was denied initially on January 12, 1998, and upon reconsideration on May 14, 1998. R at 96-99, 102-105. Madden subsequently requested a hearing before an Administrative Law Judge (“ALJ”). At the initial hearing before the ALJ, Madden raised for the first time the issue of mental impairments, and the ALJ remanded the case to an adjudication

officer to develop the medical evidence of Madden's alleged mental impairments. R. at 120-23. A second hearing was held before the ALJ on March 19, 1999, and on May 10, 1999, the ALJ denied Madden's application, finding that Madden was not "disabled" as that term is defined by the Social Security Act. R. at 26-88, 13-18. On July 6, 2001, the Appeals Council denied Madden's request for review, rendering the ALJ's decision the final decision of the Commissioner. R. at 4-5.¹

Madden graduated from high school in 1988 and received an associate degree in "science" in 1997. R. 32. His only work experience consists of a couple of weekends in the summer of 1987 when he worked for his brother's moving company. R. at 34. Madden injured his shoulder while playing high school football in October 1986 but was cleared by a doctor to return to playing football for the 1987 season. R. at 233-34. In November 1987, he cut his finger while playing football, and the following month he reported experiencing pain in his shoulders. R. at 232-33. The shoulder pain was treated with physical therapy. R. at 226-30. In February 1988, Madden sought cortisone injections for his shoulder pain and was informed by Dr. David Heller that he was "too young and [had] a condition not serious enough to justify intervention with hydrocortisone preparation." R. at 226. Madden informed Dr. Heller that he wanted "to resume weight lifting and [wa]s interested in power lifting," and Dr. Heller further advised him that if he continued weight lifting his symptoms could continue. R. at 226.

¹ On February 11, 2000, Madden filed a second application for SSI benefits. As of February 13, 2002, that application was still pending before an ALJ. On May 10, 2001, Madden's attorney filed a memorandum with the Appeals Counsel requesting that the Council remand Madden's first application for benefits so that it could be considered in conjunction with the second application. See Pl.'s Mem. Supp. Mot. to Reverse or Remand, Attach. A. The record does not indicate the Council's response to this request.

In August 1988, Madden injured his shoulder, apparently while weight lifting, and expressed concern about whether he would ever be able to do “heavy lifting.” R. at 224. Madden’s pain was treated with injections of Xylocaine and cortisone. R. at 220-23. In March 1989, Madden underwent surgery to treat the impingement syndrome in his left shoulder. R. at 189, 220-21. Madden seemed to recover rapidly but strained his shoulder in May 1989 while lifting weights. The strain was successfully treated with icing and physical therapy, and by late June 1989 Madden reported only “minimal pain.” R. at 218-19. In July 1989, Dr. Heller reported that “[n]o further treatment to the [shoulder] will be necessary” but advised Madden to “[a]void heavy lifting.” R. at 217.

In January 1990, Madden reported increased pain in his shoulder after weight lifting, and in April he underwent arthroscopy to relieve the impingement syndrome in his right shoulder. R. at 212, 185-86. By June 1990, Madden reported being “mostly pain free” and able to exercise daily although he had not returned to weight lifting. R. at 206. He informed his physical therapist that he was doing well and “looking for [a] career as [an] athletic trainer.” R. at 205.

In July 1990, Madden re-injured his right shoulder and in December 1990 underwent surgery to relieve the pain caused by the rotator cuff tendinitis and impingement syndrome in his right shoulder. R. at 204, 187-88. At the time, Dr. Heller noted that the same surgery on Madden’s left shoulder produced “excellent results.” R. at 187. Madden participated in physical therapy through July 28, 1992, at which time he reported that he could stack wood “without difficulty.” R. at 238.

The record does not indicate that Madden received any medical treatment in 1993 or 1994. In 1995, Madden sought medical treatment for hemorrhoids and painful bowel movements, R. at 266, and in May 1996 for foot blisters that had persisted since his visit to Jamaica in October 1995. R. at 265. In August 1996, Madden received a routine physical, R. at 260, and in November 1996,

he sought treatment for pain in his right elbow and forearm. R. at 258.

The record does not indicate any further medical treatment until October 10, 1997, when Madden reported sporadic elbow pain. R. at 257. On November 18, 1997, Madden visited Dr. Heller, whom he had not seen since his shoulder injuries in the early 1990's. Madden complained of pain in his right arm associated with any kind of reaching or lifting. R. at 274. Dr. Heller diagnosed the pain as rotator cuff tendinitis in the right shoulder and treated Madden with an injection of lidocaine and a two-month prescription for Feldene. He prohibited Madden from “any work requiring overhead lifting.” R. at 274.

In January 1998, Dr. Heller reported that Madden continued “to present with bilateral shoulder pain, right much worse than left, slightly improved on Feldene.” R. at 309. Dr. Heller diagnosed Madden with “[c]hronic rotator cuff tendinitis and acromioclavicular arthritis [in his] right shoulder,” treated him with a lidocaine injection, and prescribed Feldene and daily exercise. R. at 309. Also in January, Dr. Virginia Byrnes performed a physical residual functional capacity assessment of Madden and concluded that he “would be unable to do heavy or moderate work, particularly that which involved overhead lifting.” R. at 277.

In April 1998, Madden returned to Dr. Heller reporting pain in his shoulders “not just with reaching overhead but also with any sudden movements, including pulling open a door, reaching, lifting, and general activities.” Dr. Heller found that with help, Madden could achieve a “full range of motion” but with “a lot of pain at all the extremes.” R. at 309. In May 1998, Dr. Heller reported that Madden had “no restrictions with sitting, standing, or walking,” but that restrictions on “lifting, carrying, and handling objects,” which he did not expect to improve with surgery, required that Madden “find employment in areas that do not require strenuous use of the shoulder” R. at 272-73. Also in May, Dr. Rodman performed another physical residual functional capacity assessment of Madden and concluded that Madden could do work that did not involve “overhead

reaching” or lifting “above horizontal.” R. at 286.

Madden underwent another surgery in July 1998 because the shoulder pain made it difficult for him to sleep and his condition did not improve with the use of anti-inflammatory medications. R. at 305. Approximately two months after the operation, Dr. Heller observed that Madden’s range of motion was “quite good” with pain at the extremes. He advised Madden that his shoulder injuries required “permanent restrictions against overhead activities.” R. at 304.

In August 1998, Madden sought psychological treatment from Dr. Candice Porter at Mass Bay Counseling. Dr. Porter reported that Madden was “sad, depressed, hopeless, [and] confused” and her therapeutic objectives included improving his self-esteem and confidence, putting his life in perspective, helping him learn to work with and accept his limitations, and reducing his marijuana usage as his life activities increased. R. at 313. Over the course of three counseling sessions, Madden told Dr. Porter that before his shoulder injuries he was very involved with body-building and that he cannot “see himself doing anything different.” R. at 315. Madden told Dr. Porter that he could not work or lift things but that he could “walk, watch t.v., [and] ride [a] stationary bike.” R. at 315. Dr. Porter found that Madden was “unable to apply himself to structure and stress because of his physical limitations” and displayed “severe anxiety and depression,” which detrimentally affected his “mental abilities and aptitude needed to do unskilled work.” R. at 319-20. Dr. Porter concluded that “[a]t the present time, client is physically not able to hold a job.” R. at 319.

In early November 1998, Madden received mental health treatment at the Bayview Center. He complained of a depressed mood and occasional panic attacks in social settings. R. at 343. He acknowledged binge drinking and daily marijuana use and stated that the employment that he had envisioned for himself was not possible. R. at 345-47. The doctor at Bayview informed Madden

that his psychiatric symptoms could not be “clearly evaluated” until he ceased using drugs and alcohol. R. at 349.

On November 19, 1998, Madden participated in a psychiatric consultation with Dr. Michael J. Bohnert at Disability Determination Services. Madden reported to Bohnert that he has constant pain in his shoulders and his right elbow and suffers from asthma. Madden stated that his medications included Feldene as prescribed by Dr. Heller, and Klonopin and Paxil as prescribed by his psychiatrist, Dr. Lee Chartok. R. at 322. Madden told Dr. Bohnert that he was “a heavy binge drinker during the week” and that he has been a daily marijuana user since high school but “has never considered that he ha[d] a drug or alcohol problem.” R. at 323. Madden recalled that his drinking and drug use increased after his football injury. R. at 323. Madden reported that his medications seemed to help his anxiety and depression but had not eliminated them. R. at 324. He told Dr. Bohnert that he had informed Dr. Chartok about his alcohol use but not about his marijuana use. R. at 324. Dr. Bohnert performed a mental status exam on Madden, finding that Madden had “a limited degree of psychological mindedness, particularly as it related[d] to his substance usage pattern,” that Madden “made a valid effort on cognitive testing,” and that he possessed “intelligence . . . in the average range.” R. at 325-26. Dr. Bohnert recommended a chemical dependency assessment and that Madden “not manage his own funds . . . due to his vulnerability to substance abuse problems” if he were awarded benefits. R. at 326.

Madden has been receiving welfare benefits since November 1997. R. at 34. He is presently 32 years old. R. at 31. Madden claims that chronic pain from the time of his high school shoulder injury and his mental impairments prevent him from performing any work. R. at 121, 226, 147. In March 1999, at the hearing before the ALJ, Dr. Guillermo Gonzalez, a psychiatrist, testified as an expert witness that Madden should avoid frequent interaction with the public, that he should not

engage in any overhead reaching and lifting, but that he could do repetitive assembly line work. R. at 77-80. Also at the hearing, the ALJ asked vocational expert Joseph Leo Goodman what jobs, if any, Madden could perform assuming that Madden (1) was not limited with respect to residual functional capacity in terms of walking, standing, or sitting, but cannot do overhead lifting or reaching or lift more than five pounds; (2) cannot use his upper extremities for lifting at the extreme end of his range of motion; (3) cannot perform jobs that require frequent contact with the general public; (4) has a minor to moderate interference in his ability to concentrate but not to the extent that it would interfere with routine repetitive tasks or normal work functions; (5) has past work experience at the very heavy exertional level and no transferable skills; and (6) cannot climb or balance and does not have a driver's license. Goodman testified that Madden could perform the duties of a final assembler, of which there are 4,000 positions statewide; a press operator, of which there are 3,000 positions statewide; a polisher, of which there are 900 positions statewide; and a surveillance system monitor, of which there are 4,000 positions statewide. Goodman further testified that if a restriction were placed on Madden's ability to use his arms in a repetitive motion, the position of surveillance system monitor would still be available. R. at 83-85.

The ALJ found (1) that Madden has the "'severe' impairments of chronic shoulder pain with related depression/anxiety and an adjustment disorder and a history of polysubstance abuse" but that these impairments do not equal "the severity of an impairment described in Appendix 1, Subpart P, Regulations No. 4;" (2) that Madden is not a fully credible witness; (3) that Madden "retains the residual functional capacity to perform work activity lifting up to five pounds occasionally with the need to avoid lifting overhead or performing repeated lifting" and that "[h]e has mild to moderate decreased ability to interact socially and to sustain attention and concentration;" and (4) that a "significant number of jobs exist[] in the national economy which

[Madden] can perform. R. at 17-18. Based on these findings, the ALJ concluded that Madden was not disabled at any time through the date of the decision, May 10, 1999. R. at 18.

II. Discussion

Madden alleges that the ALJ's findings were not supported by substantial evidence, that the ALJ did not correctly evaluate the evidence, and that the case should be remanded for the review of new evidence.

A. Lack of Substantial Evidence Claim

Madden argues generally that the ALJ's findings were not supported by substantial evidence and particularly that the finding that Madden has "slight to moderate decreased attention and concentration in ability to interact on a social basis" is not supported by the reports of Mr. Madden's treating sources and the new and material evidence." Pl.'s Mem. Supp. Mot. to Reverse or Remand at 18.

The Court determines whether substantial evidence existed to support the ALJ's finding that the plaintiff was not disabled. See Newbury v. Heckler, 592 F. Supp. 64, 65 (D. Mass. 1984). Under the Social Security Act, a person is "disabled" if "he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months." 42 U.S.C. § 1382c(a)(3)(A). The substantial evidence standard is met where a reasonable mind could accept the evidence in the record as adequate to support the ALJ's conclusion. See Ortiz v. Sec'y of Health and Human Servs., 955 F.2d 765, 769 (1st Cir. 1991). The Court's role in reviewing the final decision of the Commissioner is a narrow one. Reyes Robles v. Finch, 409 F.2d 84, 86 (1st Cir. 1969). In reviewing the administrative decision, this Court may base its decision solely upon the parties' pleadings and the administrative record. 42 U.S.C.

§ 405(g). This Court does not make *de novo* determinations. See Rodriguez v. Sec’y of Health and Human Servs., 647 F.2d 218 (1st Cir.1981). If there is a contradiction in the evidence, it is to be resolved by the Commissioner. Lizotte v. Sec’y of Health and Human Servs., 654 F.2d 127, 128 (1st Cir. 1981); Newbury, 592 F. Supp. at 66. Although there may be more than one possible finding based on the evidence in the record, if there is substantial evidence to support the determination of the Commissioner, this Court must uphold that final agency action. See Rodriguez, 647 F.2d at 218.

The Court finds that substantial evidence existed, including the evidence discussed above, to support all of the ALJ’s findings. The particular finding regarding Madden’s “mild to moderate decreased ability” to concentrate and interact socially is clearly supported by the record and the expert testimony of Dr. Gonzalez. The Court does not consider evidence that was not before the ALJ in determining whether the ALJ’s findings were supported by substantial evidence.

Madden also alleges that the ALJ’s finding that Madden was not a “fully credible witness” does not meet the requirements of DaRosa v. Sec’y of Health and Human Servs., 803 F.2d 24, 26 (1st Cir. 1986) (holding that a decision by an ALJ to disbelieve a plaintiff’s subjective claims of pain and inability to function must be supported by substantial evidence and based on specific findings as to evidence the ALJ relied upon in making the credibility determination). The ALJ discounted Madden’s claim of disabling pain because it was not consistent with the other evidence in the record. The ALJ’s credibility finding was supported by substantial evidence and based on the specific findings

that (1) Dr. Heller, Madden's treating physician, found Madden capable of work as long as he did not engage in heavy lifting or lifting overhead, (2) Madden had been urged to seek job counseling, (3) Madden "maintains excellent activities of daily living and is able to go for walks, shop and watch television as he chooses," and (4) Madden completed an associates degree since his shoulder injury. R. at 16.

B. Evaluation of the Evidence Claim

Madden argues that the ALJ did not properly consider the evidence from all of Madden's treating sources in determining Madden's residual functional capacity. Madden contends that the opinions of Drs. Porter and Heller, his treating physicians, were that he was totally disabled and that the opinions of Drs. Bohnert and Gonzalez were insufficient to outweigh these opinions.

If an SSI claimant cannot perform the kind of work he performed in the past because of a severe impairment, the ALJ will assess the applicant's "residual functional capacity . . . age, education, and past work experience" to determine if the applicant is capable of performing any type of work available in the national economy. 20 C.F.R. § 404.1520(f)(1). Madden met the burden of showing that his severe shoulder impairment prevented him from returning to the only job he had ever performed, a mover. The burden then shifted to the Commissioner to provide evidence of work that Madden could perform, which was presented at the ALJ hearing in the form of testimony by vocational expert Goodman. The ALJ acted within his discretion in rejecting the opinion of Dr. Porter that Madden's mental impairments made him completely disabled. The opinion of a treating physician on the ultimate issue of disability is not dispositive; the determination of disability is reserved for the Commissioner. See 20 C.F.R. § 416.927(e)(1). Moreover, the consensus of all of the other medical experts in the record is that Madden is capable of light work that accommodates his particular limitations.

C. New Evidence Claim

Madden also contends that new and material medical evidence, which was not presented to the ALJ, supports remand of this case to the Commissioner. Madden's new evidence consists of a report from a psychiatric consultative examination by Dr. Lawrence F. Berley, which was conducted in connection with Madden's second application for SSI benefits and is dated September 28, 2000, and a report from his therapist, Gretchen Pauley, LSW. Madden told Dr. Berley that the reason he could not work was because of "a combination of [his] physical injuries and definitely [his] anxiety." He stated, "I don't know if I could handle a job; it might be too much responsibility." Pl.'s Mem. Supp. Mot. to Reverse or Remand, Attach. B at 2. Madden reported some trouble sleeping and that his mood most of the time is "kind of neutral." Id. Madden stated that he had been inattentive in school and had never done well, despite being in "special needs" classes. Id. at 3. The report does not indicate that Madden disclosed his completion of an associate degree program. Dr. Berley diagnosed Madden with attention deficit hyperactivity disorder, generalized social phobia, and psychological factors of anxiety and phobias affecting his shoulder and elbow pain. Id. at 8.

The report from Pauley, dated June 8, 2001, entitled "Mental Impairment Questionnaire," indicates that Madden had been receiving treatment from Pauley since November 6, 2000. Pl.'s Mem. Supp. Mot. to Reverse or Remand, Attach. C. Pauley reported that Madden's daily medications include Paxil, Clonidine and Ativan, and that Madden was experiencing appetite and sleep disturbance, oddities of thought, perception, speech and behavior, social withdrawal, and decreased energy. Id.

Madden argues that this Court should remand this case under 42 U.S.C. § 405(g)² so that the ALJ may consider this new evidence. Under 42 U.S.C. § 405(g), courts may remand cases “for further proceedings where new evidence is presented after the ALJ decision if the evidence is material *and* good cause is shown for the failure to present it on a timely basis.” See Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001) (emphasis in original). The First Circuit has held that new material may warrant a remand for reconsideration where that evidence would meaningfully alter and cast doubt on the sufficiency of the administrative record. See Evangelista v. Sec’y of Health and Human Servs., 826 F.2d 136, 139-40 (1st Cir. 1987).

The two reports offered by Madden as new evidence do not justify remanding the case. Neither report claims to represent Madden’s condition in May 1999, nor does the substance of the reports “cast doubt” on the sufficiency of the record that was before the ALJ.

III. Conclusion

For the foregoing reasons, the Plaintiff’s Motion to Reverse or Remand the Decision of the Commissioner is DENIED, and the Defendant’s Motion for an Order Affirming the Decision of the Commissioner is GRANTED. The Commissioner’s decision is AFFIRMED.

It is SO ORDERED.

DATE

DISTRICT JUDGE

² “The court may, on motion of the Commissioner of Social Security made for good cause shown before the Commissioner files the Commissioner’s answer, remand the case to the Commissioner of Social Security for further action by the Commissioner of Social Security, and it may at any time order additional evidence to be taken before the Commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record” 42 U.S.C. § 405(g).